Wong Weng Foo v Residensi Laguna Joint Management Body & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(A)-2304–12 OF 2021
KAMALUDIN MD SAID, HASHIM HAMZAH AND COLLIN SEQUERAH JJCA
31 DECEMBER 2024

Companies and Corporations — Winding up — Liquidators — First respondent's application to remove appellant as liquidator allowed by High Court — Whether first respondent must first seek leave of court to commence proceedings against court appointed liquidators — Companies Act 1965 s 236(3)

This was an appeal against the decision of the High Court in allowing the first respondent's application to remove the appellant ie Wong Weng Foo ('WWF') as liquidator of Tenaga Gagah Sdn Bhd ('TGSB'). On 31 July 2014, TGSB was ordered to be wound up by the court whereby Ler Cheung Chye and Lum Tuck Leong ('Ler and Lum') were appointed as liquidators of TGSB ('the first WU order'). On 8 August 2014, pursuant to a separate winding up order, TGSB was subject to another winding up order by the court whereby the appellant was appointed by the court as the liquidator of TGSB ('the second WU order'). TGSB subsequently lodged an appeal against the second WU order and the appeal was allowed by the Court of Appeal. The Court of Appeal also varied the first WU order whereby the official receiver was appointed as a provisional liquidator of TGSB. In the event, both WWF and Ler and Lum ceased to be the liquidators of TGSB. Thereafter, two notices of motion were filed before the winding up court to nominate a liquidator for TGSB, details of which were: (a) a notice of motion filed by Kuh Cho Sen ('KCS') to nominate Ler and Lum ('encl 101'); and (b) a notice of motion jointly filed by seven individuals to nominate WWF ('encl 104'). The winding up court dismissed encl 101 and allowed encl 104 which led to WWF's appointment as a liquidator of TGSB ('appointment order'). Dissatisfied with the decisions by the winding up court, KCS appealed to the Court of Appeal. The appointment order was stayed by the Court of Appeal pending the disposal of KCS's appeals. The official receiver, as a provisional liquidator of TGSB called for a creditors' meeting where certain agendas were put forward to be voted by the creditors of TGSB. During the creditors' meeting, the majority of the attendees voted and chose Chan Siew Mei ('CSM') as the preferred liquidator of TGSB. A consent order was recorded before the Court of Appeal whereby CSM was appointed as the liquidator of TGSB. Thereafter, WWF filed an application to the winding up court ('PW 665') for leave to file a liquidator's report. CSM filed an application to oppose PW 665 on the grounds that WWF lacked locus standi to file PW

665 as CSM did not recognise WWF as a liquidator of TGSB. The learned judge in dismissing CSM's application made the following findings, inter alia: (i) the consent order appointing CSM as a liquidator did not make any specific or express reference or order for WWF to be removed as a liquidator of TGSB; (ii) the consent order was silent as to whether WWF had been removed as the liquidator of TGSB; and (iii) the appointment order which had appointed WWF as the liquidator of TGSB, continue to remain intact, valid and subsisting. The first respondent commenced this action in the winding up court to remove WWF as a liquidator of TGSB. Salam Kurnia Builders Sdn Bhd, the first respondent and KCS filed affidavits to support the removal of WWF as a liquidator of TGSB. The grounds of removal of WWF as a liquidator were: (1) none of the creditors who attended the creditors' meeting wanted WWF to be the liquidator of TGSB as none of them had voted for him; (2) the majority of the creditors at the creditors' meeting wanted CSM to be the liquidator of TGSB; (3) the wishes of the creditors must be given due regard; and (4) it would not be in the interests of the liquidators/creditors for WWF to remain in office any longer. The application was allowed whereby WWF was removed as a liquidator of TGSB. Hence, this appeal. At the outset of this appeal, the appellant raised a preliminary objection, namely, whether the first respondent must first seek leave of court to commence proceedings against court appointed liquidators.

Held, allowing the appeal:

(1) The Federal Court in *N Chanthiran a/l Nagappan v Kao Che Jen* [2023] 5 MLJ 284 ('N Chanthiran') held that the operative words in s 236(3) of the Companies Act 1965 were the words 'subject to the control of the court' an opined that a liquidator had the status of an officer of the court pursuant to r 63 of the Companies (Winding-Up) Rules 1972 and therefore the natural conclusion had to be that leave of court was required before proceedings for the removal of a liquidator could be commenced. The whole rationale for the leave requirement in an application to remove a court appointed receiver was to avoid unnecessary and wasteful litigation being brought against liquidators and to preserve the integrity of the winding up process by precluding unwarranted and wrongful interference with the winding up process (see paras 53, 55 & 60).

(2) The decision in *N Chanthiran* applied to the instant case. By virtue of the doctrine of stare decisis the court was bound by the decision of the Federal Court in *N Chanthiran*. One could not waive the statutory provision in light of the Federal Court interpretation of the statutory provision that leave was required. Therefore, the contention of the first respondent that the appellant had waived the leave requirement as it had only now raised the preliminary objection whereas it had fully participated in the matter as well as ventilating on the merits, was without merit (see paras 66–67 & 69–70).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan Mahkamah Tinggi yang membenarkan permohonan responden pertama untuk memecat perayu iaitu Wong Weng Foo ('WWF') sebagai penyelesai Tenaga Gagah Sdn Bhd ('TGSB'). Pada 31 Julai 2014, TGSB diperintahkan untuk digulung oleh mahkamah di mana Ler Cheung Chye dan Lum Tuck Leong ('Ler dan Lum') dilantik sebagai penyelesai TGSB ('perintah WU pertama'). Pada 8 Ogos 2014, menurut perintah penggulungan yang berasingan, TGSB tertakluk kepada satu lagi perintah penggulungan oleh mahkamah di mana perayu dilantik oleh mahkamah sebagai penyelesai TGSB ('perintah WU kedua'). TGSB kemudiannya memfailkan rayuan terhadap perintah WU kedua dan rayuan itu dibenarkan oleh Mahkamah Rayuan. Mahkamah Rayuan juga mengubah perintah WU pertama di mana penerima rasmi dilantik sebagai penyelesai sementara TGSB. Dalam peristiwa itu, kedua-dua WWF dan Ler dan Lum berhenti menjadi penyelesai TGSB. Selepas itu, dua notis usul telah difailkan di hadapan mahkamah penggulungan untuk mencalonkan penyelesai bagi TGSB, butirannya adalah: (a) notis usul yang difailkan oleh Kuh Cho Sen ('KCS') untuk mencalonkan Ler dan Lum ('lampiran 101'); dan (b) notis usul yang difailkan bersama oleh tujuh individu untuk mencalonkan WWF ('lampiran 104'). Mahkamah penggulungan menolak lampiran 101 dan membenarkan lampiran 104 yang membawa kepada pelantikan WWF sebagai penyelesai TGSB ('perintah pelantikan'). Tidak berpuas hati dengan keputusan oleh mahkamah penggulungan, KCS merayu ke Mahkamah Rayuan. Perintah pelantikan itu ditangguhkan oleh Mahkamah Rayuan sementara menunggu pelupusan rayuan KCS. Penerima rasmi, sebagai penyelesai sementara TGSB, mengadakan mesyuarat pemiutang di mana agenda tertentu dikemukakan untuk diundi oleh pemiutang TGSB. Semasa mesyuarat pemiutang itu, majoriti yang hadir mengundi dan memilih Chan Siew Mei ('CSM') sebagai penyelesai pilihan TGSB. Satu perintah persetujuan direkodkan di hadapan Mahkamah Rayuan di mana CSM dilantik sebagai penyelesai TGSB. Selepas itu, WWF memfailkan permohonan kepada mahkamah penggulungan ('PW 665') untuk kebenaran memfailkan laporan penyelesai. CSM memfailkan permohonan untuk membantah PW 665 atas alasan bahawa WWF tidak mempunyai locus standi untuk memfailkan PW 665 kerana CSM tidak mengiktiraf WWF sebagai penyelesai TGSB. Hakim yang bijaksana dalam menolak permohonan CSM membuat dapatan berikut, antara lain: (i) perintah persetujuan yang melantik CSM sebagai penyelesai tidak membuat sebarang rujukan atau perintah khusus atau nyata untuk WWF dipecat sebagai penyelesai TGSB; (ii) perintah persetujuan itu senyap mengenai sama ada WWF telah dipecat sebagai penyelesai TGSB; dan (iii) perintah pelantikan yang telah melantik WWF sebagai penyelesai TGSB, terus kekal utuh, sah dan berkuat kuasa. Responden pertama memulakan tindakan ini di mahkamah penggulungan untuk memecat WWF sebagai penyelesai TGSB. Salam Kurnia Builders Sdn Bhd, responden pertama dan KCS memfailkan afidavit untuk

menyokong pemecatan WWF sebagai penyelesai TGSB. Alasan-alasan pemecatan WWF sebagai penyelesai adalah: (1) tiada seorang pun daripada pemiutang yang menghadiri mesyuarat pemiutang mahu WWF menjadi penyelesai TGSB kerana tiada seorang pun daripada mereka mengundinya; (2) majoriti pemiutang pada mesyuarat pemiutang mahu CSM menjadi penyelesai TGSB; (3) kehendak pemiutang mesti diberi perhatian yang sewajarnya; dan (4) adalah tidak menjadi kepentingan penyelesai/pemiutang untuk WWF kekal memegang jawatan lagi. Permohonan itu dibenarkan di mana WWF telah dipecat sebagai penyelesai TGSB. Oleh itu, rayuan ini. Pada permulaan rayuan ini, perayu membangkitkan bantahan awal, iaitu, sama ada responden pertama mesti terlebih dahulu mendapatkan kebenaran mahkamah untuk memulakan prosiding terhadap penyelesai yang dilantik oleh mahkamah

Diputuskan, membenarkan rayuan:

(1) Mahkamah Persekutuan dalam kes *N Chanthiran a/l Nagappan v Kao Che Jen* [2023] 5 MLJ 284 ('N Chanthiran') memutuskan bahawa perkataan berkuat kuasa dalam s 236(3) Akta Syarikat 1965 adalah perkataan 'tertakluk kepada kawalan mahkamah' dan berpendapat bahawa seorang penyelesai mempunyai status sebagai seorang pegawai mahkamah menurut k 63 Kaedah-Kaedah (Penggulungan) Syarikat 1972 dan oleh itu kesimpulan semula jadi yang perlu dibuat adalah kebenaran mahkamah diperlukan sebelum prosiding untuk pemecatan seorang penyelesai boleh dimulakan. Keseluruhan rasional bagi keperluan kebenaran dalam permohonan untuk memecat seorang penerima yang dilantik mahkamah adalah untuk mengelakkan litigasi yang tidak perlu dan membazir yang dibawa terhadap penyelesai dan untuk memelihara integriti proses penggulungan dengan menghalang campur tangan yang tidak wajar dan salah dengan proses penggulungan (lihat perenggan 53, 55 & 60).

(2) Keputusan dalam kes *N Chanthiran* terpakai kepada kes ini. Berdasarkan doktrin stare decisis, mahkamah terikat dengan keputusan Mahkamah Persekutuan dalam kes *N Chanthiran*. Seseorang tidak boleh mengetepikan peruntukan statutori memandangkan tafsiran Mahkamah Persekutuan terhadap peruntukan statutori bahawa kebenaran diperlukan. Oleh itu, hujah responden pertama bahawa perayu telah mengetepikan keperluan kebenaran kerana ia hanya membangkitkan bantahan awal sekarang sedangkan ia telah mengambil bahagian sepenuhnya dalam perkara itu serta membahaskan meritnya, adalah tidak berasas (lihat perenggan 66–67 & 69–70).]

Cases referred to

Bursa Malaysia Securities Bhd v Mohd Afrizan bin Husain [2022] 3 MLJ 450, FC (refd)

A *Kao Che Jen v N Chanthiran a/l Nagappan* [2015] MLJU 2236, CA (refd)
Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor v Secure Plantation Sdn Bhd [2017] 4 MLJ 697, FC (refd)
Mosbert Berhad (in liquidation) v Stella D' Cruz [1985] 2 MLJ 446, SC (refd)
B *N Chanthiran a/l Nagappan v Kao Che Jen* [2023] 5 MLJ 284, FC (folld)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393, FC (refd)

Legislation referred to

C Companies Act 1965 (repealed by Companies Act 2016) ss 181A, 226(3), 232, 232(1), 236(3), 266, Part X
Companies Act 2016 ss 486, 486(2), Part IV, Divisions 1, 2
Companies (Winding-Up) Rules 1972 r 63
Interpretation Acts 1948 and 1967 s 17A

D *Max Chuah Chern Tee (with Tan Chee Qin and Low Han Shin) (Chuah Qian & Partners) for the appellant.*
Yuvaraj Sugapathy (with Chandra Sekarali a/l K Kandasamy) for the first respondent.
E *Himahlini Ramalingam (with Fong Ren Ming) (Himahlini & Co) for the third respondent.*

Collin Sequerah JCA:

F INTRODUCTION

[1] This is an appeal against the decision of the learned High Court judge in Kuala Lumpur in Kuala Lumpur High Court Winding Up No WA-28PW-212–07 of 2021 ('PW212') on 19 November 2021 wherein G the first respondent's application to remove the appellant as liquidator of Tenaga Gagah was allowed.

[2] The short but sole and important issue in this appeal is whether leave of court was required to commence proceedings against a liquidator appointed by H the court in a winding up.

[3] This is a unanimous decision. My learned brother Justice Datuk Seri Kamaludin bin Md Said has since retired.

I **[4]** My learned brother Justice Dato' Hashim bin Hamzah has seen and approved the judgement.

BACKGROUND FACTS

[5] For ease of reference, the relevant parties involved in the factual matrix of this case will be referred to as follows:

(a) Wong Weng Foo ('WWF');

(b) Residensi Laguna Joint Management Body ('the applicant');

(c) Kuh Cho Sen ('KCS'); and

(d) Tenaga Gagah Sdn Bhd ('TGSB').

[6] On 31 July 2014, TGSB was ordered to be wound up by the court whereby Ler Cheung Chye and Lum Tuck Leong ('Ler and Lum') were appointed as the liquidators of TGSB ('first WU order').

[7] On 8 August 2014, pursuant to a separate winding up order, TGSB was subject to another winding up order by the court whereby WWF was appointed by the court as the liquidator of TGSB ('second WU order').

[8] TGSB subsequently lodged an appeal against the second WU order and the appeal was allowed by the Court of Appeal on 7 July 2015. The Court of Appeal also varied the first WU order whereby the official receiver was appointed as a provisional liquidator of TGSB.

[9] In the event, both WWF and Ler & Lum ceased to be the liquidators of TGSB.

[10] The Court of Appeal further directed the relevant parties to file an application in the winding up court to nominate a liquidator for TGSB.

[11] Thereafter, two notices of motion were filed before the winding up court to nominate a liquidator for TGSB, details of which are as follows:

(a) notice of motion dated 30 August 2016 filed by KCS to nominate Ler & Lum ('encl 101'); and

(b) notice of motion dated 1 November 2016 jointly filed by Saik Siw Lai, Chang Chiong Hwa, Chung Mei Ping, Faridah Hanum binti Mohd Tusoff, Tarn Mee Foong, Lim Su Hua and Lai Ming Wang to nominate WWF ('encl 104')

[12] On 28 April 2017, the winding up court dismissed encl 101 and allowed encl 104 which led to WWF's appointment as a liquidator of TGSB ('appointment order').

[13] Dissatisfied with the decisions by the winding up court, on 24 May 2017, KCS appealed to the Court of Appeal ('KCS's appeals')

[14] On 6 December 2017, the appointment order was stayed by the Court of Appeal pending the disposal of KCS's appeals.

[15] On 9 January 2019, the official receiver, as a provisional liquidator of TGSB called for a creditors' meeting where the following agendas were put forward to be voted by the creditors of TGSB ('the creditors' meeting'):

(a) Agenda:

(i) Mendapatkan pendirian pemiutang syarikat, sama ada bersetuju untuk melantik pelikuidasi Dato' Ler Cheng Chye dan Lum Tuck Chong atau pelikuidasi Wong Weng Foo atau cadangan pelikuidasi lain sebagai pelikuidasi Tenaga Gagah Sdn Bhd (Dalam Penggulungan) ('first agenda').

(b) Sama ada pihak-pihak bersetuju untuk memasuki penyelesaian global bagi tujuan merekodkan Perintah Persetujuan pada 19 March 2019 di Mahkamah Rayuan kelak ('second agenda').

[16] During the creditors' meeting, the majority of the attendees voted and chose Chan Siew Mei ('CSM') as the preferred liquidator of TGSB.

[17] According to the minutes of the creditors' meeting prepared by the official receiver, the second agenda was subsequently withdrawn and not discussed during the creditors' meeting. At this juncture, it is pertinent to highlight that no agenda to remove WWF as a liquidator of TGSB was put forward during the creditors' meeting to be voted by the creditors of TGSB.

[18] On 19 March 2019, a consent order was recorded before the Court of Appeal whereby CSM was appointed as the liquidator of TGSB with effect from 19 March 2019 ('consent order').

[19] On 17 April 2019, WWF filed a notice of motion for leave to appeal to the Federal Court to appeal against the consent order ('WWF's appeal').

[20] On 22 October 2019, WWF also applied to the Court of Appeal to amend the consent order which was subsequently dismissed by the Court of Appeal.

[21] On 18 August 2020, WWF instructed his solicitors to withdraw WWF's Appeal.

[22] On 26 November 2019, WWF filed an application to the winding up court vide Kuala Lumpur High Court Post Winding Up Application No WA-28PW-665–11 of 2019 ('PW 665') for leave to file a liquidator's report dated 25 November 2019 ('WWF's report'). A

[23] On 20 May 2021, CSM filed an application to oppose PW 665 on the ground that WWF lacked locus standi to file PW 665 as CSM does not recognise WWF as a liquidator of TGSB ('CSM's application'). B

[24] CSM's application was heard by the learned judge and subsequently dismissed. C

[25] In dismissing CSM's application, the learned judge made the following findings in the grounds of judgment ('665 GOJ'): D

(a) the consent order appointing CSM as liquidator did not make any specific or express reference or order for WWF to be removed as a liquidator of TGSB;

(b) the consent order was silent as to whether WWF had been removed as the liquidator of TGSB; E

(c) the appointment order which had appointed WWF as the liquidator of TGSB, continue to remain intact, valid and subsisting; and

(d) there are two sets of liquidators who have been appointed, ie CSM by virtue of the consent order and WWF by virtue of the 28 April 2017 order which for all intents and purposes remains intact. F

[26] On 26 November 2021, WWF instructed his solicitors to withdraw PW 665 with no order as to costs. G

[27] On 23 July 2021, the applicant commenced this action in the winding up court to remove WWF as a liquidator of TGSB.

[28] On 27 August 2021, Salam Kurnia Builders Sdn Bhd ('Salam Kurnia Builders') filed an affidavit to support the removal of WWF as a liquidator of TGSB. H

[29] On 07 September 2021, Laguna Perdana JMB filed an affidavit to support the removal of WWF as a liquidator of TGSB. I

[30] On 09 September 2021, KCS filed an affidavit to support the removal of WWF as a liquidator of TGSB.

[31] The grounds of removal of WWF as a liquidator raised by the applicant, KCS and Laguna can be summarized as follows:

(a) none of the creditors who attended the creditors' meeting on 9.1.2019 wanted WWF to be the liquidator of TGSB as none of them had voted for him;

(b) the majority of the creditors at the said creditors' meeting wanted CSM to be the liquidator of TGSB;

(c) the wishes of the creditors must be given due regard; and

(d) it would not be in the interests of the liquidation/creditors for WWF to remain in office any longer.

[32] On 19 November 2021, the learned judge allowed the application whereby WWF was removed as a liquidator of TGSB. Hence, the present appeal.

PRELIMINARY OBJECTION

[33] At the outset of this appeal, the appellant raised a preliminary objection, namely whether the applicant must first seek leave of court to commence proceedings against court appointed liquidators.

[34] It is not in dispute that when the motion was filed by the first respondent ('applicant') to remove WWF ('appellant'), no leave was sought.

[35] The recent decision of the Federal Court (FC) in *N Chanthiran a/l Nagappan v Kao Che Jen* [2023] 5 MLJ 284 ('N Chathiran') which reversed the Court of Appeal (COA) decision in *Kao Che Jen v N Chanthiran a/l Nagappan* [2015] MLJU 2236 ('Kao Che Jen') held in no uncertain terms that leave was a requirement for the removal of a court appointed liquidator.

[36] The sole issue was stated by the FC in *N Chanthiran* to be whether leave of court was required to commence proceedings against a liquidator appointed by the court in a compulsory winding up.

[37] The focal point of the decision by the FC in *N Chanthiran*, was the proper interpretation to be given to s 486(2) of the Companies Act 2016 which in its previous life existed as s 236(3) of the Companies Act 1965.

[38] It is therefore pertinent to set out s 486 in its entirety as follows:

> 486 Powers of liquidator in winding up by Court.
>
> (1) Where a company is being wound up by the Court, the liquidator may:

(a) without the authority under paragraph (b), exercise any of the general powers specified in Part I of the Twelfth Schedule; and

(b) with the authority of the Court or the committee of inspection, exercise any of the powers specified in Part II of the Twelfth Schedule.

(2) The exercise by the liquidator in a winding up by the Court of the powers conferred by this section is *subject to the control of the Court* and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers. (Emphasis added.)

[39] The COA in *N Chanthiran* held that s 486(2) of the Companies Act 2016 (in pari materia with s 236(3) of the Companies Act 1965 ('the CA 1965')) did not expressly state that leave was required to commence the proceedings against the liquidator.

[40] In coming to its decision, the COA relied upon its reasoning in a previous decision in *Kao Che Jen v N Chanthiran a/l Nagappan* ('Kao Che Jen') where it held that a contributory did not require leave of court to apply under s 232(1) of the CA 1965 to remove a liquidator because s 232(1) did not make any mention of leave.

[41] The FC however, in *N Chanthiran* through Nallini Padmanathan FCJ, expressed the reasoning of the COA as follows:

[39] As explained earlier, *Kao Che Jen* involved the same parties as in the present appeal. In *Kao Che Jen*, the contributory filed an application seeking to remove the liquidator premised on s 232(1) of the 1965 Act and to appoint the official receiver as the new liquidator. The Court of Appeal held that there was no requirement to obtain leave before commencing proceedings to remove the liquidator. The rationale for this conclusion can be found, inter alia, in paras 7, 27 and 28 of the judgment. In essence, the Court of Appeal held:

(a) *a cursory reading of* s 232(1) of the 1965 Act *does not disclose, on the face of it, any requirement for leave as a prerequisite to any application to remove a liquidator;*

(b) *s 266 of the 1965 Actalso does not have any such express provision that requires leave;*

(c) therefore, the expressed legislative intent of the law shows that no such requirement is necessary and accordingly leave is not a condition precedent for the purposes of making an application for the removal of a liquidator in a winding up ordered by the court;

(d) at paras 27 and 28, the Court of Appeal held thats 232(1) of the 1965 Act was to be compared with s 226(3) of the 1965 Act which expressly [2023] 5 MLJ 284 at 304 stipulates that leave of court is required before proceeding with or against a company which has been wound up;

(e) similarly, a comparison was drawn with s181A of the 1965 Act which expressly requires leave of court before an action maybe brought on behalf of a company by a complainant;

(f) consequently, *the Court of Appeal concluded that if indeed leave is required for the removal of a liquidator, that would have been expressly stipulated as a necessity under s 232(1)of the 1965 Act;*

(g) *it is incorrect to construe a statute by reading words into a section which does not clearly contain those words;*

(h) applying the rules of statutory construction, it was patently wrong for the judge of first instance to construe s 232(1) of the 1965 Act as stipulating a need for leave of court to be obtained prior to the removal of a liquidator; and

(i) *accordingly, the Court of Appeal held that there is no requirement for leave prior to the initiation of an action or proceedings to remove a liquidator*.(Emphasis added.)

[42] For context, it is relevant to set out s 232 general provisions as to liquidators as follows:

(1) A liquidator appointed by the Court may resign or on cause shown be removed by the Court.

[43] It is also relevant for context to set out s 266 of the 1965 Act, which reads as follows:

Section 266 Removal of liquidator.

The Court may, on cause shown, remove a liquidator and appoint another liquidator.

Sections 232(1) and 266 of the 1965 Act are in pari materia with ss 482 and 453(2) of the 2016 Act respectively.

[44] The FC in *N Chanthiran* opined that the COA in *Kao Che Jen* took a literal interpretation of s 232(1) of the 1965 Act and consequently held that no leave was required simply because there were no such express words to that effect.

[45] The FC also said that the COA was of the view that it is the duty of the court, when interpreting a statute, to construe it according to the intention of the legislature. The COA said that the court must give effect to the legal meaning of a statute just as it reads where the law is plain, straightforward and unambiguous.

[46] The COA also held that the function of the court is limited to

interpreting and giving effect to the words used by the legislature and the court is not entitled to read words into a statute unless clear reason for it is to be found in the statute itself.

[47] The COA went on to hold that neither s 232(1) nor s 266 of the 1965 Act expressly imposes a requirement for leave as a prerequisite before any application to remove a liquidator can be commenced. It was accordingly held that the expressed legislative intent of the law plainly and logically shows that no such requirement is necessary.

[48] The COA further made a comparison between s 232(1) of the 1965 Act with s 226(3) of the 1965 Act, which expressly requires leave of court before an action or proceeding can be proceeded with or commenced against a company when a winding up order has been made or a provisional liquidator has been appointed, and s 181A of the 1965 Act, which imposes a similar requirement before a complainant may bring, intervene in or defend an action on behalf of a company.

[49] The COA held that Parliament would have expressly provided in s 232(1) of the 1965 Act for leave to be obtained before an application to remove a liquidator can be commenced, as it did in ss 226(3) and 181A of the 1965 Act, if that is the legislative intent.

[50] The FC however held that it is not tenable to draw an analogy between s 232(1) of the 1965 Act, which provides a power of appointment and removal to the court in relation to a liquidator in a compulsory winding up situation, with s 226(3) of the 1965 Act, which deals with the initiation of an action or continuation of proceedings against the company in liquidation saying that they are two completely disparate issues.

[51] The FC went on to hold that the winding up of a company is governed by Part X of the 1965 Act (which is now reflected in Part IV of the 2016 Act) and the Winding Up Rules.

[52] The FC said that the primary object of winding up a company is to collect and distribute the assets of the company pari passu amongst unsecured creditors after payment of preferential debts placing reliance upon *Mosbert Berhad (in liquidation) v Stella D'Cruz* [1985] 2 ML J 446. Thus, the FC held that the predominant role of a liquidator is to safeguard the interests of the unsecured creditors.

[53] The FC held that the operative words in s 236(3) of the 1965 Act were the words 'subject to the control of the court':

Section 236(3) reads:

236 Powers of liquidator

...

(3) The exercise by the liquidator of the powers conferred by this section shall be *subject to the control of the Court*, and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers. (Emphasis added.)

[54] The FC then again speaking through Nallini Pathmanathan FCJ went on to reason as follows:

[53] *The phrase 'subject to the control of the Court' in* s 236(3) *of the 1965 Act essentially means that a liquidator is answerable to the court in the performance of his duties.* He is obligated to conduct the winding up process pursuant to the order granted by the winding up court. *Once the liquidator is sanctioned to perform his duties by virtue of his appointment by the winding up court, no party can interfere with him save with the permission of the winding up court. It would amount to an abuse of process if proceedings can be commenced against the liquidator before a different court* notwithstanding the supervision exercised by the winding up court over the liquidator and the winding up process as a whole.

[54] *Leave of court refers to the sanction and permission of the court. In seeking leave of court, a prospective litigant informs the court regarding a proposed step to be taken in a proceeding.* Since a liquidator is subject to the control of the court as provided under ss 236(3) and 277(2) of the 1965 Act the court should be advised in the event any action, including an application to remove the liquidator, is proposed to be initiated against the liquidator. *In other words, the phrase 'subject to the control of the Court' in* s 236(3) of the 1965 Act *is equivalent to a requirement for leave of court to commence proceedings against the liquidator.* (Emphasis added.)

[55] The FC further opined that a liquidator has the status of an officer of the court pursuant to r 63 of the Winding Up Rules and therefore the natural conclusion has to be that leave of court is required before proceedings for the removal of a liquidator can be commenced.

[56] The FC held that the COA in *Kao Che Jen* ought to have taken a holistic construction of the provisions of the 1965 Act and the Winding Up Rules instead of a literal and purely grammatical construction.

[57] In so doing the FC emphasised that in interpreting a statutory provision, the court must consider the purpose and object of the underlying statute citing s 17A of the Interpretation Acts states as follows:

In the Interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly

stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[58] The FC also placed reliance on *Bursa Malaysia Securities Bhd v Mohd Afrizan bin Husain* [2022] 3 MLJ 450 which held that a statutory provision ought to be read in a contextual as opposed to a purely textual manner.

[59] The FC in the end result answered the primary question of law posed as to whether the prior leave of the winding up court is required in order for legal proceedings to be commenced against a court-appointed liquidator in respect of matters transacted by the liquidator in the course of the liquidation under Divisions 1 and 2 of Part IV of the Companies Act 2016, in the affirmative.

[60] A distillation of the decision of the FC in *N Chanthiran* which also draws principles from other cases of repute, reveals that the whole rationale for the leave requirement in an application to remove a court appointed receiver is to avoid unnecessary and wasteful litigation being brought against liquidators and to preserve the integrity of the winding up process by precluding unwarranted and wrongful interference with the winding up process.

[61] The FC in *N Chanthiran* also traced the origins of the office of a liquidator in language that bears reproduction as follows:

ORIGINS OF THE OFFICE OF A LIQUIDATOR

[18] The emergence of the modern-day liquidator can be traced back to the United Kingdom's Joint Stock Companies Winding Up Act 1848, which empowered the Master of the Court of Chancery to appoint the 'official manager' of a joint-stock company that had been wound up. *The rule that a liquidator should act under the control and direction of the court originated from the position occupied by the official manager under this Act* (see Daniel Tan, *On the Sharp Edge of Public Duty and Private Interests — The Liquidator's Duty to be Objective, Impartial and Independent* (Law Gazette, Law Society of Singapore, October 2009)).

[19] The role of the official manager was, however, short-lived. The official manager was replaced under the Joint Stock Companies Act 1856 by the liquidator who became the person entrusted with the task of winding up the affairs of a company (see Rabindra S Nathan, *Law and Practice of Corporate Insolvency in Malaysia* (Thomson Reuters Asia 2019) — Chapter 11 at para 11.001).

[20] *The primary function of a liquidator is to realise the assets of the wound up company and pay the resulting proceeds to the general body of unsecured creditors* (see: Hugh K Thomson, *A Practical View of the Receiver's Relationship with Other Office Holders — The Liquidator* (2000) 16(2) IL&P 74). *In other words, a liquidator represents the entire class of unsecured creditors. It is therefore crucial for the court to ensure that a liquidator does not face unwarranted interference in the process of discharging his duties.* (Emphasis added.)

[62] This power that vests in the court is necessary thus to preserve the primary and predominant duty of the liquidator which is to safeguard the interests of the unsecured creditors.

Retrospectivity

[63] The respondent in his reply submission took the position that the decision of the FC in *N Chanthiran* was only prospective in nature and therefore did not apply to the instant case, which in the High Court, was decided before the FC decision in *N Chanthiran*.

[64] To accede to the submission by the respondent would be to ignore the principle with regard to retrospectivity as laid out by the Federal Court in *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 ML J 393 which held as follows:

> [17] That brings us to the instant appeal. Here, the direction by the High Court in its judgment is not in accordance with *Muhammed bin Hassan*. That is through no fault of the learned judge. His decision in the present case was handed down long before *Muhammed bin Hassan* was decided. But a decision of this court — or indeed of any court — is retrospective in effect unless a specific direction of prospectivity is expressed.
>
> [18] As was stated by the Court of Appeal in its judgment in *Abdillah bin Labo Khan v Public Prosecutor* [2002] 3 MLJ 298 at p 304. *It is a fundamental principle of adjudicative jurisprudence that all judgments of a court are retrospective in effect.* (Emphasis added.)

[65] The Federal Court in *Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor v Secure Plantation Sdn Bhd* [2017] 4 MLJ 697 pronounced on retrospectivity of judgements in the following terms:

> [89] *Prospective overruling had been applied in Malaysia. But was it applied in Sinnaiyah, such that it had no retrospective effect, even to the instant appeal from a decision decided by the trial court before the change in the law? 'It is a fundamental principle of adjudicative jurisprudence that all judgments of a court are retrospective in effect'* (*Abdillah bin Labo Khan v Public Prosecutor* [2002] 3 MLJ 298 per Gopal Sri Ram JCA, as he then was, delivering the judgment of the court). *The law as so stated applies not only to that case but also to all cases subsequently coming before the courts for decision, even though the events in question in such cases occurred before the ... decision was overruled*' (*Kleinwort Benson Ltd*). '*Because of the doctrine of precedent, the same would be true of everyone else whose obligations would be decided according to the law as enunciated ... even though the relevant events occurred before that decision was given*' (Lord Nicholl's fourth 'feature' in the judicial system, see also *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393, where it was held by the court per Gopal Sri Ram JCA, as he then was, delivering the judgment of the court, that the Court of Appeal was bound to follow Muhammed bin Hassan, notwithstanding

that the conviction was handed down before the change in the law). *The law as so stated in a superior judgment would apply to cases which have not yet gone to trial or are still in progress and to appeals that have been brought timeously but have not yet been concluded* (*Cadder v Her Majesty's Advocate* per Lord Hope) and *to matters or cases not yet finally determined, but the retrospective effect of a judicial decision is excluded from cases already finally determined* (*Cadder v Her Majesty's Advocate* per Lord Rodger). *That is the common law position*. There was no departure in Sinnaiyah from the common law position when the court said 'we should make it clear that this judgment only applies to this appeal and to future cases and should not be utilised to set aside or review past decisions involving fraud in civil claims'. The court merely underscored the retrospective and prospective effect of its decision, to apply to that appeal and to future cases, to cases as yet not filed and trials or appeals which have yet to be finally determined, but not to past cases which have reached a terminal end. *The ruling in Sinnaiyah was not in the prospective only form. Sinnaiyah applies to all cases that have not been finally determined, including all pending appeals*, except that in the instant appeal, it does not matter. (Emphasis added.)

[66] Following from the above, it is clear that the decision in *N Chanthiran* applies to the instant case.

[67] This leads us to the next relevant point which is plain and simply that we are by virtue of the doctrine of stare decisis bound by the decision of the FC in *N Chanthiran*.

[68] The first respondent submitted that whether or not leave was required was an old provision that already existed and provided for, except the appellant did not consider fit to raise it at the commencement of proceedings at the High Court. This omission, it was contended, constituted a waiver by the appellant.

[69] It is our considered view however, that one cannot waive the statutory provision in light of the Federal Court interpretation of the statutory provision that leave is required. There can no waiver on the law.

[70] The contention of the first respondent therefore that the appellant had waived the leave requirement as it had only now raised the preliminary objection whereas it had fully participated in the matter as well as ventilating on the merits, is without merit.

DECISION

[71] In the premises, we are constrained to allow the PO and consequently the appeal is also allowed. We make no order as to cost.

[72] Interim stay granted pending the application to the Federal Court within one month.

A **[73]** In light of our decision in respect of the preliminary point raised by the appellant, it was unnecessary for us to consider and to determine the merits of the appeal.

Appeal allowed.

B

Reported by Nabilah Syahida Abdullah Salleh

C

D

E

F

G

H

I